BENEFICIARY DESIGNATION BY SUBSTITUTE DECISION MAKERS

FINAL REPORT **104**

MARCH 2014

ISSN 0317-1604

ISBN 978-1-896078-59-5

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Acknowledgments

This report represents the culmination of several periods of research on the topic. As is customary with Institute reports, the finished product represents the contribution of Counsel, Support Staff, and Board.

In this case it is appropriate to single out the specific contributions of several people. The suggestion of the topic first came from a member of the bar who has been involved in a number of Institute projects. It came, not as a bare suggestion, but as a comprehensive, fully described and supported topic. We want to thank Phil Renaud, QC, not only for the suggestion, but also for the work that went into preparing and transmitting it. Two Counsel provided research and memos on the topic – first Cheryl Hunter Loewen, and then, a Contract Counsel, Leah Craven. Melissa Preston provided footnotes and reference checking and final editing was done by Sandra Petersson.

The task of bringing together all of the research and writing and taking carriage of the project, fell to counsel Geneviève Tremblay-McCaig, whom we thank for her analysis, writing and clear presentation. Sandra Petersson provided significant editorial help and Barry Chung was responsible for the formatting and creation of the report, in addition to supporting counsel and the project.

To all of these contributors, we express our gratitude.

Summary

One of the simplest methods to pass the benefits or proceeds of a plan or policy outside a will is to designate who should be the beneficiary on the owner's death. Beneficiary designations are commonly used for RSPs, RIFs, LIRAs, TFSA, pension plans and insurance policies. Designations can be made, changed or revoked as long as the owner has testamentary capacity. The problem, however, is that once that capacity is lost it is not clear whether a substitute decision maker has the authority to manage beneficiary decisions on behalf of the owner.

The law currently offers little guidance with respect to the powers of an attorney acting under a power of attorney or a trustee acting under a trusteeship order to make, change or revoke beneficiary designations on behalf of the donor or represented adult. As a result, banks, pension fund managers and insurance companies have inconsistent policies which may increase uncertainty and hardship for all parties involved.

As the population ages and increasingly requires substitute decision making, institutions that manage RSPs, RIFs, LIRAs, TFSAs, pension plans and insurance policies – and eventually courts – are likely to be confronted with this issue more often. Steps could be taken to update the legislation to facilitate managing beneficiary designations for a person who has lost capacity. This result can be achieved without undermining the general prohibition against delegation of testamentary powers.

This report recommends legislative changes to ensure that testamentary wishes are respected. The most common situation is when an attorney or trustee needs to transfer a plan or policy from one institution or company to another, or to convert an RSP to an RIF when the owner attains age 71. The first recommendation would clarify the law by expressly allowing an attorney or a trustee to make an administrative change on behalf of the donor or represented adult by designating any beneficiary named under a plan or policy when renewing, replacing or converting that plan or policy.

Another situation where the inability to update beneficiary designations may produce unexpected and unfair results is the beneficiary designation in favour of a former spouse or adult interdependent partner. There is a common misconception that such a designation is revoked at the end of a marriage or an adult interdependent partnership. But this is not the case. While a gift in a will to a spouse or adult interdependent partner is revoked as though the former spouse or adult interdependent partner had predeceased

the testator, a beneficiary designation remains in effect unless the plan or policy owner takes some positive action to change that designation. If the owner has lost the capacity to designate a new beneficiary – and the attorney or trustee does not have the authority to make, change or revoke the designation – the former spouse or adult interdependent partner will continue to benefit. The same will happen if the plan or policy owner forgets to revoke the unwanted beneficiary designation. The second aspect of our recommendations would clarify the law by making it consistent with the approach taken with respect to gifts in a will.

There are other issues related to designating beneficiaries under a plan or policy. The aim of the report, however, is not to make a statutory regime for beneficiary designation. Although limited in scope, our recommendations address what we consider to be the most common issues with respect to the management of beneficiary designations by substitute decision makers while ensuring overall policy coherence in the treatment of beneficiary designations and other testamentary gifts.

Recommendations

RECOMMENDATION 1

The *Powers of Attorney Act*, the *Adult Guardianship and Trusteeship Act* and the *Public Trustee Act* should expressly provide that an attorney acting under a power of attorney or a trustee acting under a trusteeship order has the authority to redesignate a beneficiary under a plan or policy that renews, replaces or converts a prior plan or policy that designated that beneficiary. 26

RECOMMENDATION 2

The *Insurance Act* and the *Wills and Succession Act* should provide that, subject to contrary intention of the plan or policy owner, the legal end of a marriage or adult interdependent relationship has the effect of revoking any beneficiary designations in favour of the former spouse or adult interdependent partner by deeming the former spouse or partner to have predeceased the owner on the same conditions and with the same exceptions as provided in section 25 of the *Wills and Succession Act*. 30

Table of Abbreviations

LEGISLATION

AGTA	*Adult Guardianship and Trusteeship Act*, SA 2008, c A-4.2
Insurance Act	*Insurance Act*, RSA 2000, c I-3
Powers of Attorney Act	*Powers of Attorney Act*, RSA 2000, c P-20
Public Trustee Act	*Public Trustee Act*, RSA 2000, c P-44.1
Wills and Succession Act	*Wills and Succession Act*, SA 2012, c W-12.2

LIRA	Locked-In Retirement Account
RESP	Registered Education Savings Plan
RIF	Retirement Income Fund
RSP	Retirement Savings Plan
TFSA	Tax-Free Savings Account

CHAPTER 1

Overview

A. Introduction

[1] In Alberta, the *Insurance Act*, the *Wills and Succession Act* and various retirement plan legislation include specific provisions that allow the owner of a plan or policy to make a beneficiary designation.[1] Pursuant to such legislation, plan and policy owners have the ability to designate a beneficiary to receive the benefit or proceeds of registered retirement savings plans (RSPs), registered retirement income funds (RIFs), tax free savings accounts (TFSAs), pension plans, profit-sharing plans, annuities, segregated funds, and life insurance policies. Using a beneficiary designation as a way of passing assets on death with fewer formalities than a will has become commonplace.[2]

[2] Beneficiary designations are often made when a plan is opened or a policy is purchased. They can also be made later by way of declaration, whether in a contract, in a will, or in a separate written document.[3] Despite the lower threshold of formalities for a beneficiary designation to be validly executed, the wording must be specific enough to determine the testamentary intention of the deceased with regard to the plan or policy.[4]

[3] A beneficiary designation can be revoked by the owner in similar manner (i.e. by way of declaration).[5] A later designation made for a particular plan or policy, whether by instrument in writing or by will, revokes any earlier designation for the same plan or policy to the extent of any inconsistency.

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[1] *Insurance Act*, RSA 2000, c I-3, s 660; *Wills and Succession Act*, SA 2012, c W-12.2, s 71.

[2] It is generally accepted that beneficiary designations are testamentary dispositions. Therefore, in the absence of statutory provisions allowing the owner of a plan or policy to pass the benefit or proceeds of that plan or policy to a beneficiary, a designation would be valid only if it complies with the requirements of the *Wills and Succession Act*.

[3] *Wills and Succession Act*, s 71; *Insurance Act*, ss 660 and 662. A beneficiary designation by way of declaration may be contained in a separation agreement, handwritten instructions to counsel, an email, or even a suicide note. See for instance, *Brown v Rempfer* [1993] 9 Alta LR (3d) 137 (ABQB); *KMM v MGM* 2002 ABQB 1003 [*KMM*].

[4] See *Wills and Succession Act*, s 71(5): "A designation in a will is effective only if it refers to the plan either generally or specifically."

[5] *Wills and Succession Act*, s 71; *Insurance Act*, s 660.

[4] There are many reasons why the owner of a plan or policy may choose to make a beneficiary designation. A designation is a simple, straightforward, convenient and relatively inexpensive way to pass the benefit or proceeds of a plan or policy to a beneficiary on the holder's death. Since the funds flow directly to that beneficiary and do not form part of the estate, they are not available to pay the debts of the deceased, and can be paid out more quickly to the designated beneficiary.[6] A beneficiary designation may also be used as an estate planning tool to reduce or defer the overall income tax liabilities of the estate.

[5] A person has the ability to designate beneficiaries as long as they remain capable of making testamentary dispositions. However, if the person loses testamentary capacity, the ability to make or revoke beneficiary designations is also lost.[7] The question is then whether the long-standing rule which provides that a person cannot delegate will-making authority prevents a substitute decision maker from making or revoking beneficiary designations.[8] From an estate planning perspective, the fact that neither a represented person nor their agent can make, change or revoke a beneficiary designation may present a problem.

B. Need for Reform

[6] Some commentators have noted that beneficiary designations originated as informal will substitutes so "poor and unsophisticated people, who could not afford the services of a lawyer to prepare a will or who did not realize the importance of a will, could dispose of their small estates".[9] Nowadays, however, beneficiary designations are accepted as important estate planning tools. They are commonly used to transfer large assets, such as RSPs, pensions, and insurance proceeds, not only because

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[6] See *Insurance Act*, s 666.

[7] Section 85(1) of the *Adult Guardianship and Trusteeship Act*, SA 2008, c A-4.2 [*AGTA*] provides that: "A guardianship order or trusteeship order is not of itself sufficient to establish that the represented adult who is the subject of the order does not have legal capacity to make a testamentary disposition." See also *Popowich Estate*, 2012 ABQB 665. Some commentators have also suggested that there may be a lower testamentary capacity threshold for beneficiary designations. See British Columbia Law Institute, *Report on Common-Law Tests of Capacity*, Final Report No 73 (September 2013), at 113-123.

[8] See Dawn Dudley Oosterhoff, "Alice's Wonderland: Authority of an Attorney for Property to Amend a Beneficiary Designation" (2002) 22 ETPJ 16.

[9] Manitoba Law Reform Commission, *Statutory Designations and the Retirement Plan Beneficiaries Act*, Final Report No 73 (October 1990) at 8.

of their convenience but for probate avoidance, creditor protection, tax incentives, and other benefits they offer.

[7] With an aging population increasingly requiring substitute decision makers to manage their property and financial affairs, the widespread use of beneficiary designations may quickly become an issue without meaningful guidance in the legislation on managing of beneficiary designations on behalf of incapable persons. A recent document submitted to Ontario's Ministry of the Attorney General by the Ontario Bar Association states: "There is a lack of clarity in the legislation and the common law has not – and likely cannot – develop a sufficiently tailored approach."[10]

[8] This lack of clarity in the legislation seems to have led courts to take a restrictive approach with respect to the validity of beneficiary designations made by a substitute decision maker. In turn, financial institutions and insurance companies have responded with increasingly cautious policies regarding attorneys' and trustees' authority to make, change or revoke beneficiary designations. Although most financial institutions and insurance companies now clearly indicate in their documentation that a substitute decision maker cannot designate or change a beneficiary designation, the application of the policy remains inconsistent.

[9] The purpose of this report is therefore to determine (1) to what extent a substitute decision maker has the power to name or change beneficiaries based on existing law, and (2) whether the current legislation should be amended to clarify the conditions under which any such power might be exercised by a substitute decision maker.

C. Scope of the Report

[10] In general, a substitute decision maker starts acting after a person is found incapable of managing their own affairs. The substitute decision maker can be appointed by the person, while capable, pursuant to the *Powers of Attorney Act* or by the court pursuant to the *Adult Guardianship and Trusteeship Act* [*AGTA*].[11] The recommendations made in this report

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[10] Ontario Bar Association, *Managing the Beneficiary Designations of Incapable Persons* (July 2013) at 2.

[11] *Powers of Attorney Act*, RSA 2000, c P-20; *Public Trustee Act*, RSA 2000, c P-44.1.

address issues with respect to the designation of beneficiaries by either an attorney acting under an enduring power of attorney or a trustee acting under a trusteeship order. The beneficiary designations contemplated are those made under a plan or policy as defined in the *Insurance Act* or the *Wills and Succession Act*. Therefore, these recommendations do not apply to other types of agencies, testamentary trusts, or trusts under the *Trustee Act*.[12]

[11] There are other issues relating to beneficiary designations, such as the format and effective date of a declaration, the status of a designated beneficiary in relation to matrimonial property claims and applications after death for maintenance and support of a family member, and the distribution of leftover funds from a plan or policy cashed in to care for the donor. While these issues are important and may have to be addressed in the future, they have no direct bearing on the recommendations made in this report.[13]

[12] The report does not dispute the long-standing rule that testamentary powers cannot be delegated.[14] The focus is to determine whether there are circumstances where the lack of clarity and certainty with respect to the power of an attorney or trustee to designate the beneficiary of a plan or policy on behalf of a donor or represented adult may be a problem and, if so, recommend legislative changes only to the extent necessary to permit the attorney or trustee to carry out the testamentary intentions of the donor or represented adult.

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[12] Any questions related to the authority of a substitute decision maker to create or to vary an instrument that has the effect of transferring an ascertainable right or interest in property from the outset, no matter how slight, or of setting up a living trust that takes immediate effect, even though not performed until the death of the principal, are outside the scope of this report. See *Easingwood v Cockroft*, 2011 BCSC 1154 [*Easingwood*]. It should also be noted that the *Trustee Act*, RSA 2000, c T-8, does not apply to a trustee appointed under the *AGTA*, except for the powers and duties with respect to investment: see *AGTA*, ss 44, 59..

[13] See also Alberta Law Reform Institute, *Exemption of Future Income Plans on Death*, Final Report No. 92 (May 2004); Alberta Law Reform Institute, *Beneficiary Designations: RRSPs, RRIFs and Section 47 of the Trustee Act*, Report No. 68 (September 1993).

[14] See comments on statutory wills for persons without testamentary capacity: Alberta Law Reform Institute, *The Creation of Wills*, Report for Discussion No 20 (September 2007) at 23-40; *The Creation of Wills*, Final Report No 96, (September 2009) at 21-40.

CHAPTER 2

Beneficiary Designation

A. Right to Designate a Beneficiary

[13] The ability to designate a beneficiary to receive a benefit payable under a plan or policy outside a will on the owner's death is governed by provincial legislation.[15] In Alberta, there are two main statutes that allow a person to make, change or revoke a beneficiary designation by a simple declaration: the *Insurance Act* and the *Wills and Succession Act* and a variety of pensions legislation.[16] Only an asset or property listed under the relevant sections of the *Insurance Act* or the *Wills and Succession Act* may pass to a designated beneficiary outside the will on the death of the owner. By virtue of this legislation, a beneficiary designation made with respect to a policy such as a life insurance policy or segregated fund, or a plan such as a TFSA or employment pension plan, is valid and need not comply with all the legal formalities of a will.

1. *INSURANCE ACT*

[14] The *Insurance Act* provides:

> **Designation of beneficiary**
>
> **660(1)** Subject to subsection (4), an insured may in a contract or by a declaration designate the insured, the

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[15] This report uses the words "plan or policy" to refer to the asset or property for which a designated beneficiary might be named and the word "instrument" to refer to the mechanism by which a designated beneficiary might be named.

[16] *Insurance Act*, s 660; *Wills and Succession Act*, s 71(1). As it relates to the making of beneficiary designations in respect of pension plans in Alberta, the relevant statutes are: *Members of the Legislative Assembly Pension Plan Act*, RSA 2000, c M-12; *Provincial Judges and Masters in Chambers Registered and Unregistered Pension Plans*, Alta Reg 196/2001; *Teachers' and Private School Teachers' Pension Plans*, Alta Reg 203/1995; *Teachers' Pension Plans (Legislative Provisions) Regulation*, Alta Reg 204/1995; *Public Sector Pension Plans (Legislative Provisions) Regulation*, Alta Reg 365/1993; *Local Authorities Pension Plan*, Alta Reg 366/1993; *Management Employees Pension Plan*, Alta Reg 367/1993; *Public Service Pension Plan*, Alta Reg 368/1993; *Special Forces Pension Plan*, Alta Reg 369/1993; *Universities Academic Pension Plan*, Alta Reg 370/1993; *Employment Pension Plans Act*, RSA 2000, c E-8; *Employment Pension Plans Act*, SA 2012, c E-8.1 (not yet in force); *Pooled Registered Pension Plans Act*, SA 2013, c P-18.5 (not yet in force). Also see *Credit Union (Principal) Regulation*, Alta Reg 249/1989, s 43.6(4). It should be noted that, in most cases, participants who have a pension partner at pension commencement are deemed to choose a joint life pension, with that pension partner as the designated beneficiary.

> insured's personal representative or a beneficiary as one to whom or for whose benefit insurance money is to be payable.
>
> **(2)** Subject to section 661(1), an insured may by declaration alter or revoke a designation referred to in subsection (1).

A beneficiary designation under the *Insurance Act* may also be made by will.[17]

[15] The *Insurance Act* defines "insurance money" as including "all insurance money, benefits, surplus, profits, dividends, bonuses and annuities payable by an insurer under a contract of insurance."[18] An undertaking to provide an annuity generally qualifies as a contract of insurance for the purpose of designating a beneficiary as one to whom or for whose benefit insurance money is to be payable. [19] This definition is broad enough to include most products sold by life insurance companies, including life insurance policies, life or term annuities and segregated funds.[20] The right of an insured to designate a beneficiary extends to insurance-based investments held in non-registered or registered accounts.[21]

[16] A designation under an insurance policy can be revocable or irrevocable.[22] An insured also has the option to appoint a trustee for a

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[17] *Insurance Act*, s 662.

[18] *Insurance Act*, s 1(ee).

[19] Section 639 of the *Insurance Act* provides that:

> **Annuity deemed life insurance**
>
> **639** For the purposes of this Subpart, an undertaking entered into by an insurer to provide an annuity, or what would be an annuity except that the periodic payments may be unequal in amount, is deemed to be and always to have been life insurance whether the annuity is for
>
> (a) a term certain,
>
> (b) a term dependent either solely or partly on a human life, or
>
> (c) a term dependent solely or partly on the happening of an event not related to a human life.

[20] See for instance *Robson v Robson*, [1995] BCJ No 2938 (BCCA).

[21] Beneficiary designations made under RSPs, RIFs, TFSAs, locked-in retirement accounts (LIRAs) or registered education savings plans (RESPs) issued by life insurance companies are governed by the *Insurance Act*.

[22] Section 661 of the *Insurance Act* provides that:

> **Irrevocable Designation**
>
> **661(1)** An insured may in a contract or by a declaration, other than a declaration that is part of a will, filed with the insurer at its head or principal office in Canada during the lifetime of the person whose life is insured, designate a beneficiary irrevocably, and in that event the insured, while the beneficiary is living, may not alter or revoke the designation without the consent of the beneficiary, and the insurance money is not subject to the control of the insured or the claims of the insured's creditors and does not form part of the insured's estate.
>
> **(2)** If an insured purports to designate a beneficiary irrevocably in a will or in a declaration that is not filed under subsection (1), the designation has the same effect as if the insured had not purported to make it irrevocable.

Continued

beneficiary.[23] The *Insurance Act* expressly provides that funds payable to a designated beneficiary on the insured's death do not form part of the estate and are exempt from creditor claims.[24]

2. *WILLS AND SUCCESSION ACT*

[17] The *Wills and Succession Act* provides:

> **Designation of person to receive a benefit under a plan**
>
> **71(2)** A participant may designate a person to receive a benefit payable under a plan on the participant's death
>
> (a) by an instrument signed by the participant or signed by another individual on the participant's behalf, at the participant's direction and in the participant's presence, or
>
> (b) by will,
>
> and may revoke the designation by one of those methods.

[18] The Act defines plan to include RSPs, RIFs, TFSAs, pension plans, profit-sharing plans, trusts, and annuities.[25] However, bank accounts and investment products issued by financial institutions such as non-

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However, a designation made in a will is not irrevocable.

[23] *Insurance Act*, s 663.

[24] *Insurance Act*, s 666. When certain requirements are met, the insurance money and the rights and interests of the insured in the insurance money and in the contract are also exempt from civil enforcement proceedings, execution or seizure during the lifetime of the insured.

[25] The *Wills and Succession Act* provides that:

> **Designation or person to receive a benefit under a plan**
>
> **71(1)** In this section,
>
> (d) "plan" means
>
> (i) a pension, retirement, welfare or profit-sharing fund, trust, scheme, contract or arrangement for the benefit of employees, former employees, agents or former agents of an employer or their dependants or beneficiaries, whether created by or pursuant to a statute or otherwise,
>
> (ii) a fund, trust, scheme, contract or arrangement for the payment of an annuity for life or for a fixed or variable term or under which money is paid for the purpose of providing, on the happening of a specified event, for the purchase of, or the payment of, an annuity for life or for a fixed or variable term, whether created before or after this section comes into force,
>
> (iii) a registered retirement savings plan or registered retirement income fund as defined in the *Income Tax Act (Canada)*,
>
> (iv) a TFSA within the meaning of section 146.2 of the *Income Tax Act (Canada)*, or
>
> (v) a fund, trust, scheme, contract or arrangement prescribed in the regulations.

Pursuant to the *Income Tax Act*, RSC 1985, c 1 (5th Supp) s 118.1(5.3), the owner of a TFSA may designate a beneficiary. If a beneficiary is designated, the proceeds of the TFSA will be paid to the beneficiary and the TFSA will be closed on the owner's death.

registered mutual funds and guaranteed investment certificate are excluded, and cannot have beneficiary designations.[26]

[19] A beneficiary designation under the *Wills and Succession Act* can be contained in a separate instrument or a will.[27] While the Act does not expressly exempt funds payable to a beneficiary on the participant's death from creditor claims, it is now generally accepted that the designated funds are not available to pay the debts of the estate as they pass directly to the beneficiary.[28]

B. Does a Beneficiary Designation Automatically Roll Over?

[20] A beneficiary designation made with respect to a plan or policy does not follow the conversion or transfer of that plan or policy.[29] For example, when an RSP is converted to an RIF or transferred from one institution to another, a new contract is set up.[30] The converted or

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[26] Section 71(17) of the *Wills and Succession Act* provides that: "This section does not apply to a contract or to a designation of a beneficiary to which the *Insurance Act* applies." This means, for instance, that a person who purchases an ordinary mutual fund from a bank cannot designate a beneficiary, unless the investment is held in a registered account. However, if that person purchases the same financial product through a segregated fund issued by a life insurance company they can make a beneficiary designation, whether registered or non-registered. See *Mayer v Nordstrom*, 2003 SKQB 397.

[27] *Wills and Succession Act*, s 71.

[28] See Alberta Law Reform Institute, *Beneficiary Designations: RRSPs, RRIFs and Section 47 of the Trustee Act*, Report No 68, (September 1993) at 14-17. The *Wills and Succession Act* does not protect non-insurance plans from creditors during the lifetime of the participant, even if a beneficiary is designated. However, Alberta's *Civil Enforcement Act*, RSA 2000, c C-15 exempts property in a registered plan or registered disability savings plan from any enforcement process while the participant is still alive: see ss 81.1, 92.1 and 93. This exemption applies to certain classes of RSPs, RIFs, deferred profit sharing plans (DPSPs) and registered disability savings plans (DSPs): see Alberta Law Reform Institute, *Exemption of Future Income Plans on Death*, Final Report No 92 (May 2004).

[29] See *Bramley v Bramley Estate*, 2003 BCSC 313, at paras 12-13:

> The RRSP and the RRIF are two separate instruments, and I agree with counsel for the defendants that the RRSP ceased to exist in August, 1997. There was no revocation of the designated beneficiary, but once the RRSP ceased to exist, there would be no need for a revocation.
>
> In my view, a new instrument was indeed created when the RRIF was created, and the designation of beneficiary in the RRSP did not automatically roll over or transfer into a designation of beneficiary for the RRIF.

[30] See *Desharnais v Toronto Dominion Bank*, 2002 BCCA 640 [*Desharnais* (CA)]. Following the decision in *Desharnais*, transfer forms started to include declarations regarding beneficiary designations. For instance, the Scotiabank's Transfer Authorization for Registered Investments Form - CA63 (online: Scotiabank <http://www.scotiabank.com/ca/common/pdf/scotiamcleod/SMcL_Transfer_Authorization_Form_For_Registered_Investements_2013.pdf>.) reads:

> I understand and agree that any beneficiary designation(s) under the plan(s) from which this transfer is made will not follow on this transfer, and that I am solely responsible for providing the Receiving Institution with any beneficiary designation(s) I may wish to make under the

Continued

transferred RSP ceases to exist and a separate plan is created, even though the assets in the plan may remain the same.[31] If the owner wishes the benefit of the plan to pass to the same beneficiary, they have to re-designate that beneficiary under the new plan. If no new beneficiary designation is made, the funds will simply form part of the estate on the owner's death.

[21] The *Insurance Act* provides, however, that a beneficiary designation in a group insurance contract replacing another group insurance contract can be deemed to apply to the replacement contract.[32] If a designation is carried forward, the certificate must indicate that the designation has been carried forward and that it should be reviewed to ensure that it reflects the insured's current intentions. The new insurer is liable for any errors or omissions by the previous insurer in respect of the recording of the designation carried forward under the replacement contract.

C. Is a Beneficiary Designation Testamentary in Nature?

[22] As stated in *Cock v Cooke*:[33]

> It is undoubted law that whatever may be the form of a duly executed instrument, if the person executing it intends that it shall not take effect until after his death, and it is dependent upon his death for its vigour and effect, it is testamentary.

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plan(s) that I hold with the Receiving Institution. I further understand and agree that the Receiving Institution denies any responsibility whatsoever for ensuring that I designate a beneficiary under the plan(s) to which this transfer is made. Without limiting the generality of the foregoing, I understand and agree that the provisions of this paragraph apply regardless of whether this transfer is between members of the Scotiabank group of companies.

[31] This should be distinguished from the situation where the direct link between an RSP and an RIF allowed the Court to conclude that the eight children of the testator were beneficiaries of the RIF, despite the fact that the declaration in the will erroneously referred to "any pension plan benefits or Registered Retirement Savings Plan that [he] may own" (the testator had converted his RSP into an RIF 14 years before the will was executed): see *Ashton Estate v South Muskoka Memorial Hospital Foundation* (2008), 40 ETR (3d) 153 (Ont Sup Ct J) at paras 4-5.

[32] *Insurance Act*, s 660.

[33] *Cock v Cooke* (1866), LR 1 P & D 241, at 243. See also *Anderson (Administration of Costello Estate) v Patton*, [1948] 2 DLR 202 [Alta SC(AD)] at 203; *Corlet v Isle of Man Bank Ltd*, [1937] 3 DLR 163 [Alta SC(AD)] at 164-165. In *Corlet*, the Court went on to state that (para 165):

> The fallacy in the argument based upon the "often quoted words" of Sir J.P. Wilde in *Cock v. Cooke* (1866) L.R. 1 P. 241, 36 L.J.P. 5, lies in a misunderstanding of what the words "vigour and effect" are applicable to. They are clearly applicable not to the result to be obtained by, or to the performance of, the terms of the instrument, but to the instrument itself. The question is whether the instrument has vigour to effect, and does effect, or is "consummate on execution" to effect, a gift or to create a trust. If the document is "consummate" to create a trust *in praesenti*, though to be performed after the death of donor, it is not dependent upon his death for its vigour and effect.

[23] While the weight of authority seems to indicate that a beneficiary designation is a testamentary disposition insofar as it is intended to take effect on the owner's death, there is still some debate as to whether this reasoning applies in all circumstances.[34] For instance, some commentators have suggested that a beneficiary designation in respect to an insurance-based product is in fact contractual, not testamentary. David Norwood and John Weir note that:[35]

> The designation of a beneficiary under a life insurance policy is an arrangement made under contract during the lifetime of the person making the designation which does not actually pass the benefit of the life insurance proceeds to the beneficiary until the life insured's death. This certainly contains the elements of a testamentary disposition but also the elements of a contractual disposition. If it is testamentary, it could fail as an invalid disposition under testamentary rules: if it is contractual, it could fail as unenforceable by the third-party stranger to the contract. In the last analysis, the law does not consider the designation of the life insurance beneficiary as a testamentary disposition: rather it has accepted it as a *contractual* disposition, which is rendered valid by statute.

[24] The case law appears, however, to support the view that a beneficiary designation under a life insurance policy – like any other designation that is dependent on death for its effect – is akin to a testamentary disposition.[36]

[25] It is also questionable whether an instrument that merely re-states the intentions of an owner with respect to the designated beneficiary of a plan or policy is by itself a testamentary disposition. For instance, the decision in *Desharnais* seems to suggest that there is a distinction between making a new designation and continuing an existing one. In that case, after concluding that a change of beneficiary on the transfer of an RSP

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[34] See for instance *MacInnes v MacInnes*, [1935] SCR 200 [*MacInnes*]. For a disposition to be testamentary, however, the death of the grantor must be the event that gives rise to the transfer of ownership; no right of any extent should have vested in the beneficiary before the grantor's death.

[35] David Norwood & John P Weir, *Norwood on Life Insurance Law in Canada*, 3d ed (Toronto: Carswell, 2002) at 291–292 (footnotes omitted). Also see Barry Corbin, "RRSP Beneficiary Designations by an Attorney" (2010) s 25:7 Money & Family Law 49.

[36] See for instance *Fontana v Fontana*, [1987] BCJ No. 452 (SC) (QL); *Rainsford v Gregoire*, 2008 BCSC 310; *Richardson Estate v Mew*, (2008) 93 OR (3d) 537 at para 66 [*Richardson* (SC)], aff'd 2009 ONCA 403 [*Richardson* (CA)], *Re Moss (Bankrupt)*, 2010 MBCA 39 [*Moss*], leave to appeal to SCC refused, 2010 Carswell Man 329 (WL Can) (SCC); *Manufacturers Life Insurance*, note 29.

from one institution to another was a testamentary disposition beyond the authority of an attorney acting under a power of attorney, the Court went on to state that a "valid transfer of the RSP would have required the continuation of the designation of Ms. Desharnais as beneficiary. That action would have been authorized by the power of attorney. It would not have been testamentary in nature."[37]

[37] *Desharnais v Toronto Dominion Bank*, 2001 BCSC 1695 [*Desharnais* (SC)] at para 41. The trial judge's findings regarding the testamentary nature of a change to the beneficiary designation were not challenged on appeal (2002 BCCA 640). Recent decisions regarding the creation or variation of a living trust by an attorney also suggest that an instrument that simply mirrors the terms of a will or intestacy rules is not a testamentary disposition. However, if the instrument has the effect of determining or changing the manner in which the principal's estate is to be distributed on their death, it is then testamentary. See for instance *Banton v Banton* (1998), 164 DLR (4th) 176 (Ont Ct J Gen Div), *Bank of Nova Scotia Trust Co v Lawson* (2005), 22 ETR (3d) 198 (Ont. Sup Ct J); *Easingwood*, note 12.

CHAPTER 3

Substitute Decision Making

A. Authority of a Substitute Decision Maker

[26] When a person becomes incapable of making certain financial or property decisions, one of three things can happen: (1) the person has planned ahead and made an enduring power of attorney to appoint someone as their attorney; (2) the person does not have an enduring power of attorney and a relative or friend has to apply to court to be appointed as trustee; or (3) there is no family member or friend who can act as trustee and the Public Trustee has to take on this role.

1. *POWERS OF ATTORNEY ACT*

[27] An enduring power of attorney is a written document that gives authority to a person to make financial and property decisions on the donor's behalf. An enduring power of attorney usually becomes effective when the donor loses the capacity to manage their own affairs.

[28] The *Powers of Attorney Act* provides that:

> **Authority of attorney**
>
> **7** Subject to this Act and any terms contained in an enduring power of attorney, an attorney
>
> (a) has authority to do anything on behalf of the donor that the donor may lawfully do by an attorney, and
>
> (b) may exercise the attorney's authority for the maintenance, education, benefit and advancement of the donor's spouse, adult interdependent partner and dependent children, including the attorney if the attorney is the donor's spouse, adult interdependent partner or dependent child.

[29] An attorney is generally authorized to do "anything on behalf of the donor that the donor may lawfully do by attorney."[38] A donor can choose to limit the scope of the attorney's authority in the enduring power of attorney document. However, the donor cannot authorize the attorney

[38] *Taubner Estate (Re)*, 2010 ABQB 60 at paras 246-247 [*Taubner*].

to do more than the law allows. Actions which are beyond the authority of an attorney include: making a will, exercising a discretionary power given personally to the donor, exercising the duties of a trustee or an executor, and getting married.[39]

[30] The *Powers of Attorney Act* further provides that:

> **Duty to act**
>
> **8** Where
>
> (a) an attorney has acted in pursuance of an enduring power of attorney or has otherwise indicated acceptance of the appointment, and
>
> (b) the enduring power of attorney has not been terminated,
>
> the attorney has, unless the enduring power of attorney provides otherwise, a duty to exercise the attorney's powers to protect the donor's interests during any period in which the attorney knows, or reasonably ought to know, that the donor is unable to make reasonable judgments in respect of matters relating to all or part of the donor's estate.

[31] Because of the fiduciary nature of the relationship, an attorney cannot use their powers other than for the benefit of the donor, unless expressly authorized by the donor or the law.[40] This has been interpreted as restricting an attorney from disposing of the donor's property without clear and specific authority to do so.[41]

[32] Pursuant to section 9(1) of the *Powers of Attorney Act*, an attorney acting under an enduring power of attorney may apply for the opinion, advice or direction of the Court with respect to the management or administration of the donor's property.

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[39] Section 1(k)(iii) of the *Wills and Succession Act* provides that a will includes "any other writing that is a testamentary disposition."

[40] *Ericksen Estate (Re)*, 2008 ABQB 587 at paras 41-43 [*Ericksen*].

[41] In *Ericksen* note 40, the Court held that an attorney does not have the ability to make gifts under a power of attorney – other than those permitted under section 8(2) of the *Powers of Attorney Act* – without the express consent of the donor. At paragraph 43, the Court concluded that: "Based on the foregoing, I am of the view that an attorney in Alberta has no authority under an enduring power of attorney to gift a non-spouse/interdependent partner or non-dependent of the donor, unless the enduring power of attorney specifically grants that authority." Also see *Taubner*, note 38 at para 291.

2. *ADULT GUARDIANSHIP AND TRUSTEESHIP ACT*

[33] If a person who has lost the capacity to make decisions in respect of financial matters has not given a power of attorney, a relative or friend may apply to the Court to be appointed as trustee.[42] A capacity assessment report and a trusteeship plan must be filed in support of the application.[43] When making a trusteeship order, the Court may make any variations to a trusteeship plan that it considers necessary; the trusteeship order may also impose limits or conditions on the trustee's authority.[44]

[34] *AGTA* provides that:

> **Property subject to trusteeship order and authority of trustee**
>
> **55(1)** Except as otherwise provided by the terms of the trusteeship order, this Act or the regulations, a trusteeship order
>
> (a) applies to all of the represented adult's real and personal property, except real property located outside Alberta, and
>
> (b) authorizes the trustee, with respect to the property to which the order applies,
>
> (i) to take possession and control of the property,
>
> (ii) to do anything in relation to financial matters of the represented adult that the represented adult could do if the represented adult were capable of making decisions with respect to financial matters, and
>
> (iii) to sign all documents and do all things necessary to give effect to any power or authority vested in the trustee.
>
> **(2)** Except as specifically permitted by subsection (3), the regulations or a trusteeship order, a trustee, other than the Public Trustee, may not sell, transfer or encumber the real property of or purchase real property on behalf of the represented adult.

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[42] *AGTA*, ss 46, 49.

[43] *AGTA*, s 46(2).

[44] *AGTA*, s 54.

(3) The trustee may register the trusteeship order against the title to the represented adult's real property in accordance with the *Land Titles Act*.

(4) Any action taken, decision made, consent given or thing done by a trustee with respect to a matter within the trustee's authority has the same effect for all purposes as if the represented adult had taken the action, made the decision, given the consent or done the thing while having capacity.

Duties and responsibilities of trustee

56(1) A trustee shall

(a) exercise the trustee's authority in the best interests of the represented adult, and

(b) act in accordance with the trusteeship order and the trusteeship plan approved by the Court.

(2) A trustee shall make expenditures out of the represented adult's property that are reasonably required for the education, support and care of the represented adult.

(3) Subject to subsection (2), a trustee may exercise the trustee's authority for the benefit of any or all of the following:

(a) the spouse or adult interdependent partner of the represented adult, if any;

(b) any child of the represented adult who is less than 18 years of age;

(c) any child of the represented adult who is 18 years of age or older and is unable to earn a livelihood because of a physical or mental disability;

(d) with the consent of the Court, any other person.

[35] Unless expressly authorized to do so, a trustee does not have the authority to dispose of the represented adult's property. Furthermore, under *AGTA*, a trustee may not make a will or a testamentary disposition:

Testamentary disposition

85(1) A guardianship order or trusteeship order is not of itself sufficient to establish that the represented adult who is the subject of the order does not have legal capacity to make a testamentary disposition.

> **(2)** A guardian or trustee of a represented adult has no power to make, on behalf of the represented adult, a will or other disposition that has testamentary effect.

[36] The *Adult Guardianship and Trusteeship Regulation* further provides that:[45]

> **1(3)** For the purposes of section 85 of the Act, "disposition that has testamentary effect" includes a designation of a beneficiary that is intended to take effect on the death of the represented adult.

[37] The broad discretion previously provided to the Court to give the trustee the authority to "do any other thing approved by the Court" under the former *Dependent Adults Act* no longer exists.[46] A trustee may, however, seek court approval to amend a trusteeship plan.[47] In addition, section 68(1) provides that a trustee may apply for the opinion, advice or direction of the Court with respect to the management or administration of the represented adult's financial matters.

[38] As discussed below, it is not likely that any of the *AGTA* provisions allowing the Court to require variations to a trusteeship plan, to approve amendments to a trusteeship plan, or to give opinion, advice or direction to a trustee on application can be construed so as to give jurisdiction to make an order authorizing a trustee to make, change or revoke a beneficiary designation on behalf of the represented adult.

3. *PUBLIC TRUSTEE ACT*

[39] When no relative or friend is willing, able or suitable to act as trustee for an adult who is incapable to make financial decisions, the Court may appoint the Public Trustee.[48] While the authority of the Public Trustee to dispose of the represented adult's property may be slightly broader than that of a trustee appointed under the *AGTA*, the same

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[45] *Adult Guardianship and Trusteeship Regulation*, Alta Reg, 219/2009, s 1(3).

[46] *Dependent Adults Act*, RSA 2000, c D-11, s 40(j). See *KMM* note 3.

[47] *AGTA*, s 54(2).

[48] *AGTA*, s 50.

restrictions apply with respect to the making of a will or other disposition that has testamentary effect. The *Public Trustee Act* provides:

> **Powers of Public Trustee as trustee**
>
> **25(1)** Notwithstanding the *Adult Guardianship and Trusteeship Act* but subject to subsection (3), the Public Trustee, while acting as trustee of the property of a represented adult, may administer, sell, dispose of or otherwise deal with the property to the same extent as could be done by the represented adult if the represented adult had capacity to deal with the property.
>
> **(2)** Without limiting the generality of subsection (1), the Public Trustee may, if it is reasonable to do so having regard to the value of the property, make gifts from the property to charities and to relatives and friends of the represented adult if, in the opinion of the Public Trustee,
>
> (a) the represented adult had made similar gifts before becoming a represented adult,
>
> (b) there is reason to believe the represented adult would make such gifts, based on the apparent intentions of the represented adult before becoming a represented adult, or
>
> (c) such a gift is appropriate having regard to the represented adult's relationship with the recipient, the nature of the occasion and any other circumstances considered reasonable by the Public Trustee.
>
> **(3)** The Public Trustee has no power to make, on behalf of a represented adult, a will or other disposition that has testamentary effect.

[40] Once the Public Trustee is appointed to act as a trustee for a represented adult, the property of that person vests in the Public Trustee.[49] The Public Trustee takes control of the represented adult's property, including any real estate, investments or income.[50] However, a valid will or a beneficiary designation under a plan or policy is not revoked by the appointment of the Public Trustee. The Public Trustee

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[49] *Public Trustee Act*, s 24.

[50] *Public Trustee Act*, ss 31-38; *Public Trustee Investment Regulation*, Alta Reg 24/2006.

strives to administer the property in a manner that respects the represented adult's intentions as expressed in any such instrument.[51]

B. Can a Substitute Decision Maker Designate a Beneficiary?

[41] The general principle is that a person cannot delegate their testamentary power, unless authorized by statute.[52] The ability to make, alter or revoke a will is a personal right of the testator that cannot be given or transferred to another. The same principle likely applies to substitute will-making. The question, therefore, is can a substitute decision maker designate a beneficiary on behalf of a represented person? Based on the existing law, the answer to that question seems to depend on whether or not the beneficiary designation can be characterized as a testamentary disposition.

[42] In recent years, it appears that Canadian courts are moving towards a more restrictive approach to the validity of beneficiary designations made by substitute decision makers. By and large, beneficiary designations have been characterized as testamentary dispositions and as such beyond the power of a substitute decision maker. As a result, courts have held that making, changing or revoking a beneficiary designation under an RSP, RIF, a pension plan or a life insurance policy would be beyond the scope of the authority of an attorney or a trustee.

[43] However, it would appear that the mere continuation of the same beneficiary designation under a plan that replaces a prior plan would be a valid exercise of power as it is not generally considered a testamentary disposition. In other words, not continuing the same beneficiary designation under the replacement plan or policy would be tantamount to changing the designated beneficiary as the benefit or proceeds of the plan

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[51] See Alberta Human Services, *Public Trustee and represented adults* (20 November 2012), Online: Government of Alberta <http://humanservices.alberta.ca/guardianship-trusteeship/opt-represented-adults-public-trustee-and-represented-adults.html>.

[52] *Chichester Diocesan Fund v Simpson*, [1944] AC 341. Also see comments regarding statutory wills: Alberta Law Reform Institute, *The Creation of Wills*, Final Report No 96 (2009) at 21-40; Uniform Law Conference of Canada: Civil Law Section, *Uniform Wills Act - Background Discussion on Statutory Wills* (Whitehorse, August 2012).

or policy would be paid to the estate on the death of the owner in the absence of a designation.[53]

1. ATTORNEYS' AUTHORITY TO DESIGNATE BENEFICIARIES

[44] The role of an attorney under an enduring power of attorney is like that of a trustee for a represented adult.[54] As mentioned above, the fiduciary nature of the relationship restricts an attorney from disposing of the donor's property without the express authority to do so. In *Richardson*, the Ontario Court of Appeal held that: [55]

> I do not understand Ms. Ferguson to suggest that she was entitled to change the beneficiary designation, cancel the Policy or cease paying the premiums during the time that Mr. Richardson was still capable of managing his property. To the extent that she makes such an argument, I would reject it. Given that there is no evidence that Mr. Richardson instructed her to do any of those things, if she had so acted, she would have been in breach of her duty to carry out the donor's instructions. Furthermore, changing the beneficiary designation to herself would have contravened the prohibition against using the Power for her own benefit, as Mr. Richardson had not expressly consented to such a change.
>
> After Mr. Richardson became incapable, as has been noted, Ms. Ferguson owed him an even higher duty of loyalty when exercising the Power. As a fiduciary in a role rising to that of a trustee, she was bound to use the Power only for Mr. Richardson's benefit and any exercise of the Power had to be done with honesty, integrity and in good faith. There is nothing in the record to suggest that a change in the beneficiary designation, cancellation of the Policy or a cessation of the premium payments would have been for Mr. Richardson's benefit.

[45] For this reason, it is doubtful that an attorney acting under a general power of attorney has the authority to make a beneficiary designation for the donor. The Manitoba Court of Appeal in *Moss* seems to suggest that an attorney can validly designate or change a beneficiary if

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[53] *Desharnais* (SC), note 37 at paras 39-41.

[54] *Fricksen*, note 40 at para 19.

[55] *Richardson* (CA), note 36 at paras 50-51.

the power of attorney document provides for that specific authority.[56] This point may not stand up to a more thorough analysis, however.

[46] In Alberta, an attorney has authority to do anything that a donor may lawfully do by an attorney, unless otherwise provided by the *Powers of Attorney Act* or in the enduring power of attorney document.[57] This broad grant of power must be read in light of the general common law prohibition against delegation of testamentary power. Hence, it is unlikely that a power of attorney document, even one that provides for the specific authority to designate or change a beneficiary, would allow an attorney to do something that cannot lawfully be done by the attorney under the governing legislation.

[47] In *Desharnais*, the Court held that a designation under an RSP account was a testamentary disposition and the change of designated beneficiary made by the attorney invalid. The Court stated that: "A valid transfer of the RSP would have required the continuation of the designation of Ms. Desharnais as beneficiary. That action would have been authorized by the power of attorney. It would not have been testamentary in nature."[58]

[48] Based on that decision, it appears that an attorney has the authority to continue a beneficiary designation, but not the authority to change it. And insofar as not continuing the designation amounts to changing the designation, the attorney must designate the same beneficiary under the replacement plan or policy.[59]

[49] An attorney may thus be allowed to continue an existing beneficiary designation. But in the absence of express statutory authority, the attorney cannot make, change or revoke any designation that is testamentary in nature.[60] The same can probably be said about the power of a court to authorize a change of designated beneficiary.

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[56] In *Moss*, note 36 at para 27, the Manitoba Court of Appeal held that a general power of attorney is "insufficient to vest the requisite authority" to permit the designation or the alteration of beneficiaries in an insurance policy. The Court went on to say that that "power must be a specific one and that is not the case here" (para 27).

[57] *Powers of Attorney Act*, s 7(a).

[58] *Desharnais* (SC), note 37 at para 41.

[59] Also see *Richardson* (SC), note 36 at para 66; *Easingwood*, note 12 at paras 45-49.

[60] Some commentators have suggested that it could be argued that attorneys already have a limited authority to make a beneficiary designation on behalf of a donor based on section 71(2) of the *Wills*

Continued

[50] Since 2011, the British Columbia *Power of Attorney Act* authorizes an attorney to change or create a beneficiary designation in certain circumstances. The Act provides:[61]

> **Attorney's powers**
>
> **(5)** An attorney may, in an instrument other than a will,
>
> (a) change a beneficiary designation made by the adult, if the court authorizes the change, or
>
> (b) create a new beneficiary designation, if the designation is made in
>
> (i) an instrument that is renewing, replacing or converting a similar instrument made by the adult, while capable, and the newly designated beneficiary is the same beneficiary that was designated in the similar instrument, or
>
> (ii) a new instrument that is not renewing, replacing or converting a similar instrument made by the adult, while capable, and the newly designated beneficiary is the adult's estate.

[51] The Alberta *Powers of Attorney Act* contains no similar provision. The Act merely provides that an attorney may apply for the opinion, advice or direction of the Court with respect to the management or administration of the donor's property.[62]

2. TRUSTEES' AUTHORITY TO DESIGNATE BENEFICIARIES

[52] Section 85(1) of the *AGTA* provides that "[a] guardianship order or trusteeship order is not of itself sufficient to establish that the represented

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and Succession Act (previously section 47(2) of the *Trustee Act*, RSA 2000, c T-8) which provides that a beneficiary designation under a plan can be made "by an instrument signed by the participant or signed by another individual on the participant's behalf, at the participant's direction and in the participant's presence." On this point, Lynne Butler writes: "This wording suggests that if a person set up a Power of Attorney in which he gave specific directions for the changing or revocation of beneficiary designations, it could legally be done": see Lynne Butler, "Beneficiary Designations: A Practical Guide" (2007) (delivered at the Legal Education Society of Alberta, 19 November 2007) at 5 [unpublished].

[61] *Powers of Attorney Act*, RSBC 1996, c 370, s 20(5). Sections 85(3) and 90 of British Columbia's new *Wills, Estates and Succession Act*, SBC 2009, c 13, will grant similar powers to a representative authorized to manage a person's financial affairs. The *Wills, Estates and Succession Act* will come into force on March 31, 2014 (as per BC Reg 148/2013).

[62] *Powers of Attorney Act*, s 9.

adult who is the subject of the order does not have legal capacity to make a testamentary disposition." It is true that a represented adult may still have the legal capacity to make, change or revoke a beneficiary designation even though a trustee has been appointed to manage their financial matters. However, the difficulty is that section 85(2) restricts the trustee's authority to make a disposition that has testamentary effect, including a beneficiary designation intended to take effect on the represented adult's death.[63]

[53] This begs the question of whether a court may authorize a trustee to designate or change a beneficiary on behalf of the represented adult who has lost the legal capacity to do so. In *KMM*, the Court stated:[64]

> Further, the argument may be made that a trustee should have the power to alter a beneficiary designation where events occur which would likely have caused the dependent adult, were he competent, to have made such an alteration. Examples were given of a child born to a dependent adult after a trustee was appointed and where that child was obviously not named as a beneficiary of life insurance but the dependent adult's other children were so named. Another example is where a named beneficiary engages in conduct of which the dependent adult would likely have seriously disapproved.
>
> The second example requires presumption and speculation as to the intentions of the dependent adult which do not fall within the limits on the trustee's powers imposed by s. 46(2) of the DAA [*Dependent Adults Act*] even where the disgraced beneficiary was a dependent of the dependent adult. The first example causes more concern because a newborn falls expressly within the class of people covered by s. 46(2)(b). However, in that situation a trustee could apply for a Court order permitting the beneficiary designation to be changed, leaving it to the Court to balance the goal of providing for the new child with the resulting dilution of monies available to other dependents.

[54] Having held that the trustee did not have the unilateral authority to change the designated beneficiary, the Court concluded that it was not

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[63] See also *Public Trustee Act*, s 25.

[64] *KMM*, note 3 at paras 52-53.

necessary to decide whether the trustee's actions fell within the courts power to approve "any other thing" under the former *Dependent Adults Act*.[65]

[55] The *AGTA* repealed and replaced the former Act. Section 54(2) of the *AGTA* provides that "[a] trustee may, with the approval of the Court, amend a trusteeship plan," while section 68(1) provides that "[a] trustee may apply, in accordance with the regulations, for the opinion, advice or direction of the Court on any question respecting a represented adult or respecting the management or administration of the represented adult's financial matters." However, it is unlikely that section 54(2) or section 68(1) extends to permitting a trustee to apply for an order that would authorize the trustee to do what section 85(2) expressly prohibits.[66]

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[65] *KMM*, note 3 at para 36, 60.

[66] As previously mentioned, sections 85 and 90 of British Columbia's new *Wills, Estate and Succession Act*, SBC 2009, c 13, will extend the powers of substitute decisions makers with respect to beneficiary designations. Section 85 will permit a representative with power over a person's financial affairs to make a beneficiary designation, if expressly authorized to do so by the Court. Section 90 will permit the representative to make a new designation of the same designated beneficiary in an instrument renewing, replacing or converting a similar instrument made by the participant while capable.

CHAPTER 4

Proposed Legislative Changes

A. Law and Practice Are Problematic

[56] The uncertainty around what constitutes a testamentary disposition and what can be validly delegated has led financial institutions and insurance companies to adopt their own policies with respect to beneficiary designation by a substitute decision maker. A number of institutions and companies allow an attorney or trustee to designate a beneficiary under a replacement plan or policy as long as the designated beneficiary remains the same. Some only authorize an attorney acting under a specific power of attorney to continue an existing designation. Others take the position that an attorney or trustee cannot name or change a beneficiary. As a result, attorneys and trustees are left with limited options with respect to the management of beneficiary designations.

[57] While the general rule precluding an attorney or trustee from designating or changing a beneficiary on behalf of the donor or represented adult may be necessary to prevent abuse, there may also be appropriate exceptions to that rule. Rather than waiting for the courts to decide on a case-by-case basis, the legislature could act to provide better guidance regarding the authority of an attorney or trustee to designate or change a beneficiary and reduce the current uncertainty. This might also help to ensure consistency in the substitute decision making with respect to beneficiary designations.

[58] As discussed above, the ability of the plan or policy owner to name the person(s) who will receive the benefit or proceeds of that plan or policy on their death is well defined in the *Wills and Succession Act* and the *Insurance Act*. What needs to be clarified is the authority of the attorneys and trustees under the *Powers of Attorney Act*, the *Adult Guardianship and Trusteeship Act* and the *Public Trustee Act*, to make, change or revoke beneficiary designations on behalf of plan or policy owners.

B. When Should a Substitute Decision Maker be Allowed to Redesignate Beneficiaries without Court Authorization?

[59] There may be situations where an attorney or trustee needs to take certain actions to preserve the tax or estate planning of the donor or represented adult. For instance, the conversion of an RSP to an RIF or the transfer of a TFSA from one financial institution to another may be required by law or necessary to protect the financial interests of the owner. The problem is that unless the attorney or trustee is permitted to redesignate the beneficiary under the new plan, the proceeds will not pass to the designated beneficiary but fall into the owner's estate on death. This result would be contrary to the decision in *Desharnais*.

[60] An attorney or trustee may be put in a difficult position if the financial institution or insurance company takes the position that only the owner can designate a beneficiary and therefore the attorney or trustee has no power to do so. This effectively prevents actions that would fulfill the intention of the incapable person. While an attorney or trustee should not be permitted to speculate on the owner's intent where no beneficiary has been designated, an exception should be made if there is a beneficiary designation and the attorney or trustee simply seeks to carry over that designation under the new plan.

[61] The legislation should specifically empower attorneys and trustees to redesignate an existing beneficiary under a plan or policy that renews, replaces or converts a prior plan or policy that the donor or represented adult made while capable. This would eliminate any remaining issues with respect to the ability to legally do so—whether or not such action is characterized as a testamentary disposition.[67]

RECOMMENDATION 1

The *Powers of Attorney Act*, the *Adult Guardianship and Trusteeship Act* and the *Public Trustee Act* should expressly provide that an attorney acting under a power of attorney or a trustee acting under a trusteeship order has the authority to redesignate a beneficiary under a plan or policy that renews, replaces or converts a prior plan or policy that designated that beneficiary.

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[67] See for instance *British Columbia (Public Guardian and Trustee of) v Egli*, 2004 BCSC 529, aff'd 2005 BCCA 627; *Ericksen*, note 40; *Taubner*, note 38; *Richardson* (CA), note 36; *Easingwood*, note 12.

C. Should a Substitute Decision Maker be Allowed to Designate, or Change, or Remove Beneficiaries with Court Authorization?

[62] A mere power to redesignate the same beneficiary on the renewal, replacement or conversion of a plan or policy is limited. Therefore, the question arises whether an attorney or trustee should be permitted to make, change or revoke a beneficiary designation with court approval.[68] Examples include applying for a court order to add a designation in favor of a child born after the donor or represented adult lost capacity, or to remove a beneficiary who engages in conduct of which would likely have caused the donor or represented adult to revoke the designation. There may also be situations where it is financially advantageous to open a registered investment account for a person who has lost capacity and use the beneficiary designation features if authorized to do so by the court.[69]

[63] Allowing an attorney or trustee to make, change or revoke a designation if authorised by the court would provide greater flexibility to address variables in the financial and estate planning of a person who has lost capacity. On occasion, it might help to avoid an unjust or inappropriate distribution of the estate while providing the protection of court approval. However, this result would still amount to the exercise of testamentary power by a court.

[64] Alberta courts do not have jurisdiction to make statutory wills for persons without testamentary capacity. As summarized by the Alberta Law Reform Institute:[70]

> [T]here are some major philosophical hurdles militating against allowing a court to simply come in and rearrange a person's testamentary affairs when the subject is personally incapable of doing it. Canadian legislation largely respects the view that will-making is a sacrosanct personal act that should not ever be delegated to another.

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[68] See e.g. *Power of Attorney Act*, RSBC 1996, c 370, s 20(5)(a); *Wills, Estates and Succession Act*, SBC 2009, c 13, s 85(3) (not yet into force).

[69] A trustee has the duty to "exercise the care, skill and diligence that a reasonably prudent person would exercise in managing the person's own financial matters," which could involve utilizing estate planning tools such as beneficiary designations [*AGTA*, s 57(1)]. See also *Powers of Attorney Act*, s 8; *AGTA*, ss 56, 57, 59; *Public Trustee Act*, ss 36-37; *Trustee Act*, ss 2-8.

[70] *The Creation of Wills*, note 14 at 36-37.

[65] The Institute did not recommend changes to the legislation to allow courts to engage in substitute will-making. Among the arguments against statutory wills were: the subjective nature of creating a will for another person, the existence and nature of evidence in contested cases, the increase in litigation which could act as a drain on estates, the risk of misuse and abuse, and the fact that there did not seem to be any pressing need for court made wills or significant reform movement in Canada advocating this major legal change.[71]

[66] For similar reasons, it does not seem advisable to let courts exercise testamentary power under the guise of authorizing an attorney or trustee to name, change or revoke a beneficiary on behalf of an incapable person. That assets transferred through beneficiary designations are often as important, if not more so, than those assets passed by wills bolsters this reasoning. To avoid discrepancy, it is preferable to deal with court authorisation in a manner which is consistent with the *Wills and Succession Act* where the policy is clear.

[67] Consequently, the Alberta Law Reform Institute does not recommend allowing an attorney or trustee to apply for a court order authorizing the creation, change or revocation of a beneficiary designation on behalf of the donor or represented adult.

D. Should a Beneficiary Designation be Revoked When a Marriage or Adult Interdependent Relationship Ends?

[68] There will be instances where a former spouse or adult interdependent partner will continue to benefit as a result of the owner's inability to revoke that beneficiary designation. This result has been cited as ground for expanding attorneys' and trustees' powers in specified circumstances.[72] However, most "forgotten" beneficiary designations are only discovered after the death of the plan or policy owner when the money is paid to the designated beneficiary. At that point it is too late for an attorney or trustee to make the change even if they were authorised to do so.

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[71] *The Creation of Wills*, note 14 at 21-40.

[72] Ontario Bar Association, *Managing the Beneficiary Designations of Incapable Persons* (July 2013) at 5.

[69] While a gift in a will to a spouse or adult interdependent partner is revoked when the relationship ends, a beneficiary designation will remain in effect even after the marriage or adult interdependent partnership has ended. The general releases and waivers usually contained in a separation agreement may not be specific enough to revoke a beneficiary designation in favour of a former spouse or adult interdependent partner. As a result, unless the plan or policy owner takes positive action to change the designation, the benefit or proceeds of that plan or policy will pass to the former spouse or adult interdependent partner. Allowing an attorney or trustee to change the designation would provide a partial remedy. However, as noted, very often the "forgotten" designations are not discovered in time.

[70] There does not appear to be any reason for treating beneficiary designations differently than gifts in a will when the marriage or adult interdependent partnership ends. The difference is additionally difficult to justify considering that beneficiary designations are often used as an alternative to a will. The issue of "forgotten" designations could easily be dealt with by adopting the same policy that applies for wills. Subject to a contrary intention, a beneficiary designation in favour of a former spouse or adult interdependent partner would automatically be revoked upon the ending of that relationship.[73]

[71] Sometimes more than one beneficiary may be designated in the same instrument. For example, the owner may designate their spouse and children under a life insurance policy either as co-beneficiaries or alternate beneficiaries. In that case, the end of the marriage should only revoke the designation of the spouse but should not alter the designation to the children. In line with the *Wills and Succession Act*, partial revocation of a beneficiary designation to a former spouse or adult interdependent partner should be done in such a way so as not to affect the rights of other designated beneficiaries.

[72] Under the *Wills and Succession Act*, revoking a gift to a former spouse or adult interdependent partner is achieved by deeming that person to have predeceased the testator. This mechanism preserves the balance of the testator's estate plan expressed in the will. Deeming a former spouse or adult interdependent partner to have predeceased the

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[73] *Wills and Succession Act*, s 25.

owner of a plan or policy would similarly preserve the owner's estate plan and the rights of other beneficiaries who may be designated in the plan or policy.[74]

[73] The *Wills and Succession Act* also protects the gift to a former adult interdependent partner where the partner is married to the testator when the testator dies or is related to the testator by blood or adoption.[75]

[74] As with the *Wills and Succession Act*, revoking a beneficiary designation at the end of a marriage or adult interdependent partnership should only apply with respect to marriages or adult interdependent relationships that end after the recommended provision comes into force.

RECOMMENDATION 2

The *Insurance Act* and the *Wills and Succession Act* should provide that, subject to contrary intention of the plan or policy owner, the legal end of a marriage or adult interdependent relationship has the effect of revoking any beneficiary designations in favour of the former spouse or adult interdependent partner by deeming the former spouse or partner to have predeceased the owner on the same conditions and with the same exceptions as provided in section 25 of the *Wills and Succession Act*.

E. Conclusion

[75] The legislative changes proposed in the report are incremental and reflect what should be happening in practice following the decision in *Desharnais*. The changes have the advantage of removing uncertainty in this area. If attorneys and trustees conclude that an existing beneficiary designation should be continued when a plan or policy is rolled over or transferred, the legislation from which attorneys and trustees draw their authority should make it clear that they have the power to re-designate the same beneficiary under the new plan or policy.

[76] Such power does not extend to making a new beneficiary designation or changing or revoking a designation made by the donor or

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[74] See also *Insurance Act*, s 664. This section provides for insurance money to be paid to surviving beneficiaries or the insured's personal representative if a beneficiary dies before the insured.

[75] For background on this provision see Alberta Law Reform Institute, *Wills and the Legal Effect of Changed Circumstances*, Final Report No 98 (2010) at pp 45-46.

represented adult while capable. The proposed changes simply eliminate doubt with respect to the attorney's or trustee's authority to make what are essentially administrative changes on behalf of the donor or represented adult.

[77] Additional changes to the legislation address the question of whether the legal end of a marriage or adult interdependent partnership should have the effect of revoking any beneficiary designation in favour of a former spouse or adult interdependent partner. Automatic revocation of a designation at the end of the relationship eliminates the need for an attorney or trustee to apply to court to remove a former spouse or adult interdependent partner who was left as a designated beneficiary after the donor or represented adult became incapable. Given the significance of assets that may pass to a designated beneficiary on the death of the plan or policy owner, it is appropriate that the law regarding designation of beneficiaries reflect the same policy that applies to former spouses or partners under the *Wills and Succession Act*.

JS PEACOCK QC (Chair)

ND BANKES

PL BRYDEN

AS de VILLARS QC

MT DUCKETT QC

JT EAMON QC

HON CD GARDNER

WH HURLBURT QC

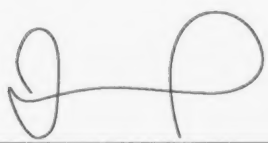
R KHULLAR QC

AL KIRKER QC

PJM LOWN QC (Director)

HON AD MACLEOD

ND STEED QC



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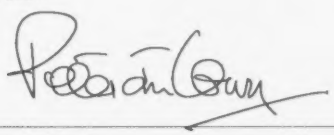

DIRECTOR